

**FULL TEXT OF NEW CLAUSES IMPLEMENTING
THE AMERICAN RECOVERY AND REINVESTMENT ACT OF 2009**

52.203-15 Whistleblower Protections Under the American Recovery and Reinvestment Act of 2009 (Mar 2009)

(a) The Contractor shall post notice of employees rights and remedies for whistleblower protections provided under section 1553 of the American Recovery and Reinvestment Act of 2009 (Pub. L. 111-5).

(b) The Contractor shall include the substance of this clause including this paragraph (b) in all subcontracts.

(End of clause)

52.204-11 American Recovery and Reinvestment Act—Reporting Requirements (Mar 2009)

(a) Definitions. As used in this clause—

Contract, as defined in FAR 2.101, means a mutually binding legal relationship obligating the seller to furnish the supplies or services (including construction) and the buyer to pay for them. It includes all types of commitments that obligate the Government to an expenditure of appropriated funds and that, except as otherwise authorized, are in writing. In addition to bilateral instruments, contracts include (but are not limited to) awards and notices of awards; job orders or task letters issued under basic ordering agreements; letter contracts; orders, such as purchase orders, under which the contract becomes effective by written acceptance or performance; and bilateral contract modifications. Contracts do not include grants and cooperative agreements covered by 31 U.S.C. 6301, et seq. For discussion of various types of contracts, see FAR Part 16.

First-tier subcontract means a subcontract awarded directly by a Federal Government prime contractor whose contract is funded by the Recovery Act.

Jobs created means an estimate of those new positions created and filled, or previously existing unfilled positions that are filled, as a result of funding by the American Recovery and Reinvestment Act of 2009 (Recovery Act). This definition covers only prime contractor positions established in the United States and outlying areas (see definition in FAR 2.101). The number shall be expressed as "full-time equivalent" (FTE), calculated cumulatively as all hours worked divided by the total number of hours in a full-time schedule, as defined by the contractor. For instance, two full-time employees and one part-time employee working half days would be reported as 2.5 FTE in each calendar quarter.

Jobs retained means an estimate of those previously existing filled positions that are retained as a result of funding by the American Recovery and Reinvestment Act of 2009 (Recovery Act). This definition covers only prime contractor positions established in the United States and outlying areas (see definition in FAR 2.101). The number shall be expressed as "full-time equivalent" (FTE), calculated cumulatively as all hours worked divided by the total number of hours in a full-time schedule, as defined by the contractor. For instance, two full-time employees and one part-time employee working half days would be reported as 2.5 FTE in each calendar quarter.

Total compensation means the cash and noncash dollar value earned by the executive during the contractor's past fiscal year of the following (for more information see 17 CFR 29.402(c)(2)):

(i) Salary and bonus.

(2) Awards of stock, stock options, and stock appreciation rights. Use the dollar amount recognized for financial statement reporting purposes with respect to the fiscal year in accordance with the Statement of Financial Accounting Standards No. 123 (Revised 2004) (FAS 123R), Shared Based Payments.

(3) Earnings for services under non-equity incentive plans. Does not include group life, health, hospitalization or medical reimbursement plans that do not discriminate in favor of executives, and are available generally to all salaried employees.

(4) Change in pension value. This is the change in present value of defined benefit and actuarial pension plans.

(5) Above-market earnings on deferred compensation which is not tax-qualified.

(6). Other compensation. For example, severance, termination payments, value of life insurance paid on behalf of the employee, perquisites or property if the value for the executive exceeds \$10,000.

(b) This contract requires the contractor to provide products and/or services that are funded under the American Recovery and Reinvestment Act of 2009 (Recovery Act). Section 1512(c) of the Recovery Act requires each contractor to report on its use of Recovery Act funds under this contract. These reports will be made available to the public.

(c) Reports from contractors for all work funded, in whole or in part, by the Recovery Act, and for which an invoice is submitted prior to June 30, 2009, are due no later than July 10, 2009. Thereafter, reports shall be submitted no later than the 10th day after the end of each calendar quarter.

(d) The Contractor shall report the following information, using the online reporting tool available at <http://www.FederalReporting.gov>.

(1) The Government contract and order number, as applicable.

(2) The amount of Recovery Act funds invoiced by the contractor for the reporting period. A cumulative amount from all the reports submitted for this action will be maintained by the government's on-line reporting tool.

(3) A list of all significant services performed or supplies delivered, including construction, for which the contractor invoiced in this calendar quarter.

(4) Program or project title, if any.

(5) A description of the overall purpose and expected outcomes or results of the contract, including significant deliverables and, if appropriate, associated units of measure.

(6) An assessment of the contractor's progress towards the completion of the overall purpose and expected outcomes or results of the contract (i.e., not started, less than 50 percent completed, completed 50 percent or more, or fully completed). This covers the contract (or portion thereof) funded by the Recovery Act.

(7) A narrative description of the employment impact of work funded by the Recovery Act. This narrative should be cumulative for each calendar quarter and only address the impact on the contractor's workforce. At a minimum, the contractor shall provide—

(i) A brief description of the types of jobs created and jobs retained in the United States and outlying areas (see definition in FAR 2.101). This description may rely on job titles, broader labor

categories, or the contractor's existing practice for describing jobs as long as the terms used are widely understood and describe the general nature of the work; and

(ii) An estimate of the number of jobs created and jobs retained by the prime contractor, in the United States and outlying areas. A job cannot be reported as both created and retained.

(8) Names and total compensation of each of the five most highly compensated officers of the Contractor for the calendar year in which the contract is awarded if—

(i) In the Contractor's preceding fiscal year, the Contractor received—

(A) 80 percent or more of its annual gross revenues from Federal contracts (and subcontracts), loans, grants (and subgrants) and cooperative agreements; and

(B) \$25,000,000 or more in annual gross revenues from Federal contracts (and subcontracts), loans, grants (and subgrants) and cooperative agreements; and

(ii) The public does not have access to information about the compensation of the senior executives through periodic reports filed under section 13(a) or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78m(a), 78o(d)) or section 6104 of the Internal Revenue Code of 1986.

(9) For subcontracts valued at less than \$25,000 or any subcontracts awarded to an individual, or subcontracts awarded to a subcontractor that in the previous tax year had gross income under \$300,000, the Contractor shall only report the aggregate number of such first tier subcontracts awarded in the quarter and their aggregate total dollar amount.

(10) For any first-tier subcontract funded in whole or in part under the Recovery Act, that is over \$25,000 and not subject to reporting under paragraph 9, the contractor shall require the subcontractor to provide the information described in (i), (ix), (x), and (xi) below to the contractor for the purposes of the quarterly report. The contractor shall advise the subcontractor that the information will be made available to the public as required by section 1512 of the Recovery Act. The contractor shall provide detailed information on these first-tier subcontracts as follows:

(i) Unique identifier (DUNS Number) for the subcontractor receiving the award and for the subcontractor's parent company, if the subcontractor has a parent company.

(ii) Name of the subcontractor.

(iii) Amount of the subcontract award.

(iv) Date of the subcontract award.

(v) The applicable North American Industry Classification System (NAICS) code.

(vi) Funding agency.

(vii) A description of the products or services (including construction) being provided under the subcontract, including the overall purpose and expected outcomes or results of the subcontract.

(viii) Subcontract number (the contract number assigned by the prime contractor).

(ix) Subcontractor's physical address including street address, city, state, and country. Also include the nine-digit zip code and congressional district if applicable.

(x) Subcontract primary performance location including street address, city, state, and country. Also include the nine-digit zip code and congressional district if applicable.

(xi) Names and total compensation of each of the subcontractor's five most highly compensated officers, for the calendar year in which the subcontract is awarded if—

(A) In the subcontractor's preceding fiscal year, the subcontractor received—

(1) 80 percent or more of its annual gross revenues in Federal contracts (and subcontracts), loans, grants (and subgrants), and cooperative agreements; and

(2) \$25,000,000 or more in annual gross revenues from Federal contracts (and subcontracts), loans, grants (and subgrants), and cooperative agreements; and

(B) The public does not have access to information about the compensation of the senior executives through periodic reports filed under section 13(a) or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78m(a), 78o(d)) or section 6104 of the Internal Revenue Code of 1986.

(End of clause)

In order to accept orders under the American Recovery and Reinvestment Act (Recovery Act) of 2009, the following changes are REQUIRED for all Federal Supply Schedule Contracts and are hereby incorporated into this contract.

1. 52.212-4 Contract Terms and Conditions-Commercial Items (Mar 2009) DEVIATION (FEB 2007), AND 52.212-4 Alternate I (Mar 2009) DEVIATION (FEB 2007). The basic clause is required and Alternate I is required as applicable.

Make the following change to 52.212-4 no matter which version of the clause is in the contract:

- Remove paragraph (r) in its entirety and replace with the following:

(r) Compliance with laws unique to ordering activity contracts. The Contractor agrees to comply with 31 U.S.C. 1352 relating to limitations on the use of appropriated funds to influence certain Federal contracts; 18 U.S.C. 431 relating to officials not to benefit; 40 U.S.C. 3701, et seq., Contract Work Hours and Safety Standards Act; 41 U.S.C. 51-58, Anti-Kickback Act of 1986; 41 U.S.C. 265 and 10 U.S.C. 2409 relating to whistleblower protections; Section 1553 of the American Recovery and Reinvestment Act of 2009 relating to whistleblower protections for contracts funded under that Act; 49 U.S.C. 40118, Fly American; and 41 U.S.C. 423 relating to procurement integrity.

2. 52.212-5 Contract Terms and Conditions required to Implement Statutes to Executive Orders-Commercial Items (basic clause)—make the following changes to the clause as indicated below:

(NOTE the basic clause is being replaced with Alternate II.)

A. Change the title of the clause as follows:

52.212-5 Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Items (Mar 2009), Alternate II (Mar 2009)

B. Add to subparagraph (b) the following items and renumber the remaining items in consecutive order:

X (3) 52.203-15, Whistleblower Protections Under the American Recovery and Reinvestment Act of 2009 (Section 1553 of Pub. L. 111-5).

X (4) 52.204-11, American Recovery and Reinvestment Act—Reporting Requirements (Mar 2009) (Pub. L. 111-5).

C. DELETE subparagraphs (d) and (e) and REPLACE with the following:

(d)(1) The Comptroller General of the United States, an appropriate Inspector General appointed under section 3 or 8G of the Inspector General Act of 1978 (5 U.S.C. App.), or an authorized representative of either of the foregoing officials shall have access to and right to—

(i) Examine any of the Contractor's or any subcontractors' records that pertain to, and involve transactions relating to, this contract; and

(ii) Interview any officer or employee regarding such transactions.

(2) The Contractor shall make available at its offices at all reasonable times the records, materials, and other evidence for examination, audit, or reproduction, until 3 years after final payment under this contract or for any shorter period specified in FAR Subpart 4.7, Contractor Records Retention, of the other clauses of this contract. If this contract is completely or partially terminated, the records relating to the work terminated shall be made available for 3 years after any resulting final termination settlement. Records relating to appeals under the disputes clause or to litigation or the settlement of claims arising

under or relating to this contract shall be made available until such appeals, litigation, or claims are finally resolved.

(3) As used in this clause, records include books, documents, accounting procedures and practices, and other data, regardless of type and regardless of form. This does not require the Contractor to create or maintain any record that the Contractor does not maintain in the ordinary course of business or pursuant to a provision of law.

(e)(1) Notwithstanding the requirements of the clauses in paragraphs (a), (b), and (c), of this clause, the Contractor is not required to flow down any FAR clause in a subcontract for commercial items, other than—

(i) *Paragraph (d) of this clause.* This paragraph flows down to all subcontracts, except the authority of the Inspector General under paragraph (d)(1)(ii) does not flow down; and

(ii) *Those clauses listed in this paragraph (e)(1).* Unless otherwise indicated below, the extent of the flow down shall be as required by the clause—

(A) 52.203-13, Contractor Code of Business Ethics and Conduct (Dec 2008) (Pub. L. 110-252, Title VI, Chapter 1 (41 U.S.C. 251 note)).

(B) 52.203-15, Whistleblower Protections Under the American Recovery and Reinvestment Act of 2009 (Section 1553 of Pub. L. 111-5).

(C) 52.219-8, Utilization of Small Business Concerns (May 2004) (15 U.S.C. 637(d)(2) and (3)), in all subcontracts that offer further subcontracting opportunities. If the subcontract (except subcontracts to small business concerns) exceeds \$550,000 (\$1,000,000 for construction of any public facility), the subcontractor must include 52.219-8 in lower tier subcontracts that offer subcontracting opportunities.

(D) 52.222-26, Equal Opportunity (Mar 2007) (E.O. 11246).

(E) 52.222-35, Equal Opportunity for Special Disabled Veterans, Veterans of the Vietnam Era, and Other Eligible Veterans (Sept 2006) (38 U.S.C. 4212).

(F) 52.222-36, Affirmative Action for Workers with Disabilities (June 1998) (29 U.S.C. 793).

(G) 52.222-39, Notification of Employee Rights Concerning Payment of Union Dues or Fees (Dec 2004) (E.O. 13201).

(H) 52.222-41, Service Contract Act of 1965 (Nov 2007) (41 U.S.C. 351, *et seq.*).

(I) 52.222-50, Combating Trafficking in Persons (Feb 2009) (22 U.S.C. 7104(g)).

(J) 52.222-51, Exemption from Application of the Service Contract Act to Contracts for Maintenance, Calibration, or Repair of Certain Equipment—Requirements (Nov 2007) (41 U.S.C. 351, *et seq.*).

(K) 52.222-53, Exemption from Application of the Service Contract Act to Contracts for Certain Services—Requirements (Feb 2009) (41 U.S.C. 351, *et seq.*).

(L) 52.222-54, Employment Eligibility Verification (Jan 2009).

(M) 52.226-6, Promoting Excess Food Donation to Nonprofit Organizations. (Mar 2009) (Pub. L. 110-247). Flow down required in accordance with paragraph (e) of FAR clause 52.226-6.

(N) 52.247-64, Preference for Privately Owned U.S.-Flag Commercial Vessels (Feb 2006) (46 U.S.C. Appx. 1241(b) and 10 U.S.C. 2631). Flow down required in accordance with paragraph (d) of FAR clause 52.247-64.

(2) While not required, the contractor may include in its subcontracts for commercial items a minimal number of additional clauses necessary to satisfy its contractual obligations.

NOTE: 52.212-5 (basic clause) and Alternate I do NOT apply to the Federal Supply Schedule contracts.

Questions and Answers

A. General Questions and Answers

Where should contractors go to obtain guidance regarding contractor reporting requirements prescribed in FAR 52.204-11, American Recovery and Reinvestment Act—Reporting Requirements?

Contractors will report the information, using the online reporting tool available at www.FederalReporting.gov (currently under construction) using instructions at that website.

Who is responsible for ensuring that contractors comply with FAR 52.204-11, American Recovery and Reinvestment Act— Reporting Requirements (MAR 2009)?

Although FAR 52.204-11 is being incorporated at the contract level, ordering Contracting Officers are responsible for obligating Recovery Act funds through task and delivery orders. Therefore, ordering Contracting Officers are in the best position to ensure compliance with the clause. The ordering Contracting Officer shall be responsible for ensuring that contractors comply with the reporting requirements in support of that order. If a contractor fails to comply with Recovery Act reporting requirements, and this information is reported to the contract level Contracting Officer, then the contract level Contracting Officer should take appropriate contractual action to address noncompliance.

If the contractor is taking exception to the Recovery Act clauses, can I negotiate and tailor the terms and conditions of the Recovery Act clauses into the contract?

No. Contracting Officers shall not accept any exceptions/deviations to, or tailoring of, Recovery Act clauses.

Does the Implementation of the Recovery Act require additional preaward and post award requirements for posting on Federal Business Opportunities (FedBizOpps)?

Yes. There are both unique preaward and post award requirements to FedBizOpps. See GSA Acquisition Letter V-09-01, Section 7D, Reporting Requirements, for guidance on those requirements.

Are there additional data entry requirements for Federal Procurement Data System (FPDS) for task and delivery orders or for the establishment of Schedule Blanket Purchase Agreements (BPAs)?

Yes. There are unique requirements for entering Recovery Act funded award data into FPDS. See GSA Acquisition Letter V-09-01, Section 7D, Reporting Requirements, for guidance on those requirements. In addition, for FAS unique requirements on entering Recovery Act funded awarded data into FPDS see FAS Office of the Controller, Memorandum, titled American Recovery and Reinvestment Act of 2009: Operational Policy and Procedures for Tracking and Reporting of ARRA Activities, dated April 14, 2009.

B. Federal Supply Schedule Questions and Answers.

Can the Schedule Contracting Officer modify Individual Schedule contracts to include the Recovery Act Clauses prior to June 15, 2009?

Yes. Schedule Contracting Officers can modify Individual Schedule contracts to incorporate the Recovery Act clauses prescribed in this IL prior to June 15, 2009. However, for that Schedule contractor to be identified that their contract contains the Recovery Act clauses in FAS external customer facing systems—GSA Advantage®, GSA eLibrary, and e-Buy—by the "ARRA" icon, that Schedule contractor must reaccept the Recovery Act clauses through the Recovery Act mass modification on or after June 15, 2009.

Do existing Blanket Purchase Agreements (BPAs) against Schedule contracts need to be modified to include the Recovery Act Clauses?

If orders against existing BPAs will be funded, in whole or in part, by the Recovery Act, Contracting officers shall modify existing BPAs to include the Recovery Act clauses prescribed in this IL into those BPAs. In the event a contractor refuses to accept such a modification, orders against that BPA shall not be eligible for receipt of Recovery Act funds.

Existing BPAs that include a Schedule contract flow down provision would not need to be modified if the Schedule contract includes the Recovery Act clauses because the Recovery Act clauses at the Schedule contract level would apply to those orders issued against the BPA, if the order was funded, in whole or in part, by the Recovery Act.

My solicitation contains the Special Item Number (SIN) for Ancillary Repair and Alteration (R&A). Do I need to include the clauses prescribed in FAR Case 2009-008, American Recovery and Reinvestment Act of 2009 (the Recovery Act)—Buy American Requirements for Construction Material?

No. Ancillary R&A services are solely associated with the repair, alteration, delivery or installation of supplies and/or services acquired under the same Schedule, and are routine and noncomplex in nature. Ancillary Repair and Alteration SINs exclude major or new construction of buildings, roads, parking lots, and other facilities, complex repair and alteration of entire facilities, or significant portions of facilities, and Architect-Engineer (A/E) services. However, depending on the requirement, the ordering Contracting Officer may decide to add applicable clauses from FAR Case 2009-008 at the ordering level for BPAs or orders that include ancillary R&A services.

Are BPAs and orders established under Schedule contracts considered competitive for purposes of reporting rationales under the Recovery Act?

BPA's and orders established in accordance with the Schedule ordering procedures in FAR 8.405-1 and 8.405-2 are considered to be competitive. BPA's and orders established in accordance with FAR 8.405-8, for limited sources, are not considered to be competitive for purposes of reporting rationales under the Recovery Act.

What effect does the Recovery Act have on GSA's Schedule State and Local Programs?

To accept Schedule orders funded, in whole or in part, by the Recovery Act from eligible state or local ordering activities Schedule contractors are required to accept the Recovery Act clauses, the order must be within the scope of one of the currently approved GSA Schedule State and Local Programs (Cooperative Purchasing, Disaster Recovery Purchasing or 1122 CounterDrug Program), and for the Cooperative Purchasing and Disaster Recovery Programs the Schedule contractor must have elected to participate in that Program.